UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CHARLES D. LEMA,	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	***Civil No. 91-320 P***
UNITED STATES OF AMERICA,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON RESERVED ' 2255 CLAIM

In its opinion and order filed June 5, 1992 on the petitioner's motion to vacate his sentence under 28 U.S.C. ' 2255, the court (Laffitte, J.) reserved decision on the petitioner's claim that he was denied effective assistance of counsel because his trial counsel refused to allow him to testify at trial and directed that an evidentiary hearing be held thereon before me. That hearing was held on July 28, 1992. Post-hearing memoranda were filed on August 3, 1992. I recommend that the following findings of fact be adopted and that the petitioner's ' 2255 motion to vacate be denied on the reserved issue.

I. PROPOSED FINDINGS OF FACT

Lema was tried in this court on August 8 and 9, 1989 for aiding and abetting and conspiring to aid and abet the possession with intent to distribute over 500 grams of cocaine. He was represented at trial by David Pomeroy, Esq., an experienced criminal defense lawyer. Pomeroy obtained certain pretrial discovery from the government by voluntary disclosure and sought other information by

motion, which was denied. He met with the petitioner on three occasions[1] and spoke with him twice by telephone prior to trial. Lema at all times professed his innocence to Pomeroy. Based on his knowledge of the government's case gleaned from pretrial discovery and his discussions with the petitioner, Pomeroy informed the petitioner before the trial began that he would have to testify in his own behalf if he was to have any chance of prevailing. However, after the court conditionally granted the government's *in limine* motion to permit the introduction of Lema's prior criminal convictions[2] and the government rested, Pomeroy changed his position and, during the recess that followed, told Lema that he did not want him to testify. The petitioner was convinced that he had to testify in his own behalf and argued the point vociferously with Pomeroy. In the course of their sometimes heated exchange, most of which took place outside the courthouse, Pomeroy told Lema that he had the jury where he wanted them (he told Lema that the jury did not believe Hood, the government's key witness against Lema) and that Lema's taking the stand would ruin his chances for an acquittal. It was Pomeroy's judgment that the defense should rest without calling any witnesses.

[1] The first of these occasions was a bail hearing held on April 10, 1989. No substantive discussion of the merits of the case took place at that time.

[2] Lema was previously convicted of breaking and entering and interstate transportation of stolen metal. The court's order permitted the government to introduce the prior federal conviction if the petitioner elected to testify in his own behalf.

The petitioner, who at the evidentiary hearing acknowledged himself to be a strong and assertive individual, argued his position forcefully with Pomeroy. When Pomeroy told him that he, Pomeroy, was the boss, intimating that the decision as to whether Lema would testify was his to make, Lema did not back down. Pomeroy also informed Lema of the rule in *Luce v. United States*, 469 U.S. 38 (1984).[3]

In the final analysis, Lema accepted Pomeroy's advice not to testify. He explained at the evidentiary hearing that he did so because he believed Pomeroy to be a good lawyer, because he trusted Pomeroy's assessment of how the jury viewed the evidence and the credibility of the government's key witness against him, and because he believed Pomeroy could deliver a better closing argument if he did not testify. In reaching this decision, Lema considered its effect under *Luce* on his ability to pursue points on appeal. The discussion between Pomeroy and Lema ended with Lema saying, ``Alright, okay, let's go." The defense rested without calling any witnesses. The jury returned a guilty verdict on all counts. Lema's direct appeal was denied.

Had Lema testified at trial he would have denied any criminal activity and attempted to explain away incriminating testimony presented by the government.[4] In describing how he happened to agree to accompany his co-conspirator, Souza, on a second trip to Maine when he knew that during the first

[3] Pomeroy explained to Lema that, pursuant to *Luce*, if he did not testify at trial he would not be able to preserve for appeal the issue of the correctness of the court's *in limine* ruling concerning the admissability of his prior federal conviction.

[4] For a summary of the evidence against Lema, see *United States v. Lema*, 909 F.2d 561, 562-64 (1st Cir. 1990).

trip Souza engaged in drug trafficking, Lema would have stated that he told Souza before consenting to go that he ``didn't want to be involved in his bullshit."

The petitioner did not inform the trial judge at trial or sentencing of his claim that Pomeroy prevented him from testifying in his own behalf. Nor did he mention the claim in any of his post-trial motions or to his appellate counsel. His first assertion of this ineffective-assistance-of-counsel claim was made in November 1991, several months after Pomeroy's death on February 1, 1991.

II. LEGAL DISCUSSION

A criminal defendant's Sixth Amendment ```right to counsel is the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citation omitted). To be constitutionally ineffective, a defense attorney's performance must not only be deficient but also so prejudicial as to undermine confidence in the justness of the trial's result. *Id.* at 687, 694. A criminal-defense attorney's trial representation is to be judged deferentially and with ``every effort . . . made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689; *see also Perron v. Perrin*, 742 F.2d 669, 673 (1st Cir. 1984).

A court reviewing criminal-defense counsel's performance ``must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action `might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citation omitted). ``The Constitution does not guarantee a defendant a letter-perfect defense or a successful defense; rather, the performance standard is that of reasonably effective assistance under the circumstances then obtaining." *United States v. Natanel*, 938 F.2d 302, 309-10 (1st Cir. 1991) (citation omitted), *cert.*

denied, 112 S. Ct. 986 (1992).

A criminal defendant who proves that counsel's performance was deficient next must demonstrate that his lawyer's flaws likely prejudiced his defense. ``It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Rather, ``[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. ``A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

The petitioner had a constitutional right to testify in his own behalf. *United States v. Butts*, 630 F. Supp. 1145, 1147 n.3, 1148-49 (D. Me. 1986). If Pomeroy had failed to insure that Lema was informed of this right and of the fact that the ultimate decision whether or not to exercise it was his alone to make, or had prevented Lema from testifying in the face of his unyielding determination to take the stand, then Pomeroy's performance clearly would have been constitutionally deficient. *See United States v. Teague*, 953 F.2d 1525, 1534 (11th Cir. 1992), *petition for cert. filed*, No. 91-8422 (May 21, 1992). However, on the basis of my full review of the record, including Lema's testimony at the July 28, 1992 hearing and my observations of his demeanor, I discredit any suggestion by him that he did not know of his unwaivable right to testify and conclude that the evidence does not otherwise establish that Pomeroy failed to satisfy his duty to inform in this regard or that the manner in which Pomeroy dealt with Lema overwhelmed Lema's determination to testify.[5] Rather, I am satisfied that, after arguing aggressively and at length in favor of taking the stand and after considering each of Pomeroy's elaborated reasons against doing so, Lema finally acceded to Pomeroy's advice and agreed

[5] The petitioner bears the burden of establishing by a preponderance of the evidence that he is entitled to relief. *United States v. DiCarlo*, 575 F.2d 952, 954 (1st Cir.), *cert. denied*, 439 U.S. 834 (1978).

to proceed on the basis of counsel's articulated strategy.[6]

In evaluating an ineffective-assistance claim, courts must defer to a wide range of strategic choices and resist the temptation to engage in Monday-morning quarterbacking. While Pomeroy's strategy was fraught with risk, this record does not support a finding that it was professionally unreasonable. Although by testifying Lema could have attempted to exculpate himself from the effects of the government's incriminating testimony, it is also apparent that an effective cross-examination might well have led Lema to make incriminating statements, such as those suggesting he was aware that during his first trip to Maine Souza engaged in drug trafficking. Also to be considered was the knowledge that the government would introduce into evidence Lema's prior federal conviction for interstate transportation of stolen property. Related to all of this was Pomeroy's judgment, which cannot be gainsaid, that the jury did not believe the government's key witness against Lema. In sum, Lema has not overcome the presumption that, in the circumstances, Pomeroy's approach ```might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citation omitted).

III. CONCLUSION

For the foregoing reasons, I recommend that the petitioner's motion to vacate be ***DENIED*** on the reserved issue.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or

[6] *Nichols v. Butler*, 953 F.2d 1550 (11th Cir. 1992), relied on by the petitioner, is distinguishable from this case in the critical respect that no evidence has been presented indicating that Pomeroy ever threatened to seek to withdraw as Lema's trial counsel if Lema insisted on testifying.

proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 4th day of August, 1992.

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David M. Cohen
United States Magistrate Judge